State of Michigan
Court of Appeals
Detroit Office

June 4, 2004

Ms. Debra A. Gutierrez-McGuire
Administrative Counsel
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: **ADM File No. 2003-04**
Criminal Procedure Rules

Dear Ms. McGuire:

On behalf of the Clerk's Office of the Michigan Court of Appeals, I am writing to offer the following comments on the proposed amendments to the criminal procedure rules. I recognize that the comment period closed on May 1, 2004, but perhaps these suggestions will nevertheless be useful to the process of finalizing the rules.

MCR 6.310(C) and MCR 6.429(B). These rules require that a motion to withdraw the plea or a motion to correct the sentence be filed within 6 months of entry of the judgment of sentence. The rules also provide that if such a motion is not filed within 6 months, relief can only be obtained by way of a motion for relief from judgment. Further, certain issues cannot be raised on appeal unless they have been preserved in the trial court.

We are concerned that these rules appear to create a time period in which defendant cannot proceed in the trial court, but the issues also cannot be raised in the Court of Appeals. This period would extend from 6 months 1 day to 12 months after sentencing. MCR 7.205(F)(3) permits an application for leave to appeal within 12 months after entry of the judgment of sentence. The relief from judgment rule provides that a motion under that rule cannot be filed if an appeal, which would include an application, is available. If counsel is appointed 7 months after entry of the judgment of sentence, or, although timely appointed, counsel does not review the case until 7 months after entry of the judgment of sentence, and counsel then notices a substantial problem with the plea or sentence, the proposed rule appears to block counsel from proceeding in the trial court while also blocking him from raising the issue in an application in this Court even though he has another 5 months in which to file the application for leave to appeal.

The practical result of this could be that this Court would see a substantial increase in the number of motions to remand filed with applications for leave to appeal, wherein the defendants will seek a remand *before* this Court decides the application for leave to appeal. The Court may also receive motions without an appeal having been filed, such motions seeking an order requiring the trial court to review the issues (these motions would be rejected for lack of a pending case). But motions to remand that are filed with applications for leave will represent an increased workload for Court of Appeals judges and staff, and disposition of applications will be correspondingly delayed.

Further, MCR 6.310 and MCR 6.429 appear to conflict with MCR 7.205(F)(4), which tolls the time period for filing an application if a motion to withdraw the plea or to correct the sentence is filed within 12 months of entry of the judgment of sentence. The latter rule allows 12 months; the former proposed rules would allow only 6 months.

MCR 6.509(C). This rule states: "If the motion for relief from judgment was summarily dismissed without order for response by the prosecutor, relief may not be granted by an appellate court unless it first directs a response to the application be filed by the prosecuting attorney." This is potentially problematic for the Court of Appeals because it places additional obligations on the Court if a panel of judges concludes that defendant may be entitled to some type of relief. Further, because we are unaware what problem the drafters sought to cure with the amendment, we are unable to weigh the cure against its impact on the Court of Appeals.

Under the proposed rule, when a summary denial has occurred at the trial court, this Court cannot grant relief without first directing the prosecutor to file an answer. But the Court must determine whether a summary denial has occurred. While many trial court opinions and orders do provide that information, a substantial number of opinions and orders are silent on this point. And registers of action, the scope and accuracy of which vary widely across the state, may or may not specify this information. Our review of the matter will thus be impacted by our ability to determine whether a summary denial occurred. Further, some prosecutors may file an answer in the trial court before being directed to do so. In that situation, does the rule contemplate that this Court could grant relief or must the Court still direct that an answer be filed at the appellate level because the trial court never specifically ordered the prosecutor to respond below?

Furthermore, does "relief granted" include the simple granting of the application for leave to appeal? And finally, how does the rule contemplate that this Court will "direct" an answer from the prosecutor. May the Court use its 28-day notice letter? Or must it issue an order? Issuance of a letter can be accomplished through the Clerk's Office; issuance of an order requires a far more complex and time-consuming set of procedures.

If the basic concept is not ultimately rejected, the amendment might be redrafted as follows:

> (C) Responsibility of the Prosecuting Attorney. If the motion for relief from judgment was summarily dismissed without an order for response by the prosecutor, and the prosecutor has not filed a response to the defendant's application in the appellate court, the prosecuting attorney must file an appellee's brief in response to the defendant's brief in a case in which an appellate court has granted the defendant's application for leave to appeal.

(D) Responsibility of the Appellate Court. In orders granting the defendant's application for leave to appeal where the prosecuting attorney has not already filed a response, the court must direct the prosecution to file an appellee's brief in response to the defendant's brief on appeal before the appellate court may grant further relief to the defendant.

This will avoid the result of requiring responses to every application, but will ensure that the prosecutor has responded to the substance of such discretionary appeals as are granted leave by this Court.

MCR 6.508(F). This rule would operate to reinstate claims of appeal if defendant did not appeal within the time allowed under MCR 7.204(A)(2) and he demonstrates that his retained or appointed attorney(s) either disregarded his instructions to perfect a timely appeal or otherwise failed to provide effective assistance and, but for their deficient performance, defendant would have perfected a timely appeal of right. In such situations, the trial court "shall issue an order restating the time in which to file an appeal of right."

To the extent that the drafters acted from a belief that the rule is constitutionally required, there is room for disagreement. The key case in this area is *Evitts v Lucey*, 469 US 387; 83 L Ed 2nd 821, 832; 105 S Ct 830 (1985), where the US Supreme Court concluded that a defendant is entitled to the effective assistance of appellate counsel, but the Court specifically stated that there are "numerous courses" to remedy that wrong, including the ability to engage in "post-conviction attack on the trial judgment." In Michigan, a motion for relief from judgment and a possible subsequent application for leave to appeal offer a defendant a remedy when he or she asserts the denial of the effective assistance of appellate counsel.

Finally, a serious concern is that the proposed court rule permits the trial court (the lower court) to determine the jurisdiction of this Court (the higher court), contrary to one of the basic principles of appellate jurisdiction. We are concerned that, if MCR 6.508(F) is adopted, we will receives appeals in which the trial courts have issued orders restarting the time period even though the criteria has not been satisfied.

Instead of adopting a rule that enables such a result, it might be better to leave the issue with the Court of Appeals as in the recent amendments to MCR 7.204 and 7.205 concerning late service of final orders on appellants. The opportunity to file an application for leave to appeal already gives the defendant an avenue of relief. If it is believed that an opinion or order from this Court should specifically address why the issues raised by defendant lack merit in a situation where the original appeal of right was lost due to ineffective assistance of counsel, then it may be more effective to draft a court rule that requires such an opinion or order from this Court. However, we think it will be problematic to empower the trial courts to impact the jurisdiction of this Court.

MCR 6.428. For the reasons stated above concerning appellate jurisdiction, this proposed rule is also a concern. Further, it raises questions because it states that the trial court shall restart the time for filing an appeal of right if, among other options, *appointed* counsel "either disregarded the defendant's instruction to perfect a timely appeal of right, or otherwise failed to provide effective assistance, and, but for counsel's deficient performance, the defendant would have perfected a timely appeal of right." Appeals by right in criminal cases proceed under MCR 6.425(F). If counsel is timely requested for appeal, the trial court appoints counsel and files the order of appointment on a SCAO form that constitutes the claim of appeal. There is no means by which this procedure would not occur within the time allowed by

MCR 7.204(A)(2). MCR 6.425(F)(3) states: "Entry of the order by the trial court pursuant to this subrule constitutes a timely filed claim of appeal for the purposes of MCR 7.204." The substance of this provision was not changed by the proposed amendments, and so it is unclear what purpose is to be served by the inclusion of *appointed* counsel in proposed MCR 6.428.

Very truly yours,

Sandra Schultz Mengel
Chief Clerk

cc: Chief Judge William C. Whitbeck
Judge Helene N. White, Chair, COA Rules Committee